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IN THE

# Supreme Court of the United States

October Term, 1960

NUMBER 395

HUEY CASH, FULLER CASH
and ARTHUR REAGAN, JR.

*Petitioners in Certiorari*

vs.

UNITED STATES OF AMERICA

**Petition for certiorari to the United States Court of Appeals for the Fifth Circuit.**

WESLEY R. ASINOF,
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Atlanta, Georgia

IN THE

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and ARTHUR REAGAN, JR.

*Petitioners in Certiorari*

vs.

UNITED STATES OF AMERICA

**Petition for certiorari to the United States Court of Appeals for the Fifth Circuit.**

Now comes Huey Cash, Fuller Cash and Arthur Reagan, Jr., petitioners in certiorari, and petitions this Honorable Court for the writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

## SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

Appellants were indicted by the United States Grand Jury for the Northern District of Georgia on a four (4)

count indictment charging them with one count of conspiracy to violate the Internal Revenue Laws, one count charging Huey Cash with possessing and selling 24 gallons of non-tax-paid distilled spirits, one count charging Huey Cash and Fuller Cash with possessing and selling 18 gallons of non-tax-paid distilled spirits, and one count charging Arthur Reagan, Jr. with possessing and transporting 480 gallons of non-tax-paid distilled spirits. At the conclusion of the evidence the court granted a judgment of acquittal on Count 2 as to Appellant Fuller Cash. The jury found all defendants guilty on all counts that were submitted to the jury by the Court.

Another alleged co-defendant, Jimmy Sanders, was also indicted and charged with the offenses set forth in counts one and two of the indictment, but was not placed on trial.

Evidence was offered by the government, and objected to by the defense, that Jimmy Sanders, alleged co-conspirator who was not on trial, had sold a quantity of non-tax-paid whiskey to John R. Evans, a witness for the government. The witness was permitted to testify that he had a conversation with Jimmy Sanders, outside the presence of Huey Cash or any defendant who was then on trial regarding a sale of whiskey by Sanders. Sanders was alleged to have made the statement that Huey Cash had authorized Sanders to sell Evans the whiskey. The testimony was objected to on the ground that there was no prima facie showing by the government of a conspiracy between Sanders and any of the defendants on trial, and therefore hearsay. (R. 24.) The Court overruled the objection and admitted the evidence.

The defendant Huey Cash was sworn as a witness in his own behalf, denying that he had any knowledge of the sale of the whiskey by Sanders, or of a conspiracy between himself with any of the alleged conspirators. The other defendants did not take the stand as witnesses.

Insofar as the record discloses, the following is a summation of all the evidence tending to connect the alleged conspirator, Jimmy Sanders, with any of the defendants on trial. John R. Evans, witness for the government, testified that he went to Huey Cash's house (R. 18) but couldn't get him up; that he blew his horn and called him a time or two, and "somebody" finally hollered and asked him what he wanted, (R. 19) and the witness replied he had "come after it," whereupon the voice said "See Jimmy," and he "assumed" it was Huey Cash although he did not recognize the voice. The witness then went to Jimmy Sanders' house and told him what he wanted, whereupon Sanders said to the witness "Wait here by the fire and I will go get it for you." (R. 20) Sanders then brought back three cases of whiskey in a few minutes, sold it to the witness and the witness paid Sanders $140.00 for it. Sanders' house is about two hundred and fifty yards from Huey Cash's house. (R. 23) Evans testified that Sanders told him that Huey Cash told Sanders "to go ahead and let (him) have the whiskey" and that Sanders also told Evans when he went after the whiskey the next morning he had sold all of it before Huey Cash saw him. (R. 24) Evans also testified that he got some whiskey from Sanders at a church. He testified he paid $140.00 to Sanders for three more cases at that time. (R. 25) Huey Cash had told Evans "Whenever you want whiskey, see Jimmy." (R. 28)

On cross examination (R. 36) this witness testified he was familiar with Cash's voice, and that he could not identify the voice he heard inside Huey Cash's house as being that of Cash, because there were other people in the house who stayed there. The witness also testified it could have been someone else that called out to him (R. 37). The voice did not mention Jimmy Sanders when it said "Go see Jimmy;" but the witness merely assumed that fact, (R. 38), and that Huey Cash was not present when the witness bought the whiskey from Sanders, nor did the witness ever pay Cash for any of this whiskey.

Evans further testified (R. 40) that the first time he got whiskey from Sanders he did not know where he got it from, but the second time he got it from a church; that Cash was not present; that he never saw Cash at that church; never talked to Cash about that church; didn't know of his own knowledge (R. 41) whether Cash ever was at that church at any time or that the whiskey ever came from Mr. Cash; that he never saw Cash and Sanders in each other's presence (R. 43) nor did he see Cash at any time having any sort of conversation with Sanders; that when he first went to visit Huey Cash he asked him if he knew where he could purchase some whiskey, and Cash told him that "he thought maybe Jimmy Sanders sold it" (R. 43).

Witness Robert Lee Lester (R. 159) testified that he knew Jimmy Sanders and that he lived right up above Huey Cash's house; that he had a conversation with Cash about Sanders and Cash told the witness that he had given "Jimmy two hundred dollars to live on, to keep him, to get shed of his old car."

The remaining evidence for the government related to other instances of transactions between the appellants tending to connect them with the conspiracy, and the denial by Huey Cash of any participation therein. However, since the sufficiency of the evidence is not argued or insisted upon, and it being a question for the jury as to that fact, the remainder of the evidence is not detailed in this brief; the only question being raised as to the inadmissibility of the acts and declarations of the alleged co-conspirator Jimmy Sanders.

The United States Court of Appeals for the Fifth Circuit, in affirming the conviction, ruled this evidence to have been sufficient to authorize the hearsay testimony to be admitted.

A petition for rehearing was filed by petitioners, and denied by the United States Court of Appeals.

## JURISDICTION

(a) The judgment of the Court of Appeals was entered on June 10, 1960. A petition for rehearing was denied August 12, 1960. The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. 1254 (1), and under and by virtue of 18 U.S.C. 3772 and within the time prescribed in Rule XI of the Rules of Practice and Procedure, promulgated May 7, 1934 (292 U.S. 661, 666, 54 S. Ct. XXXIX).

(b) The statute of the United States, the validity of which is involved in this application for certiorari, is as follows:

18 U.S.C.A. #371. CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES

> If two or more persons conspire either to commit any offense against the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(c) This petition for certiorari is being filed in this Court within 30 days from the date of the judgment denying the petition for rehearing.

(d) The nature of the case and the rulings of the Court were such as to bring the case within the jurisdictional provisions relied upon, and the grounds upon which it is contended that the questions involved are substantial are as follows:

1.

The United States Court of Appeals for the Fifth Circuit has decided an important question of federal law in such a way as to broaden the scope of hearsay testimony in conspiracy prosecutions.

## THE QUESTION PRESENTED

Whether an alleged co-conspirator's declaration, made out of the presence of the defendants on trial and implicating them in a conspiracy, is admissible evidence where such alleged conspirator is not then on trial.

Petitioners contend that the admission of this evidence contravenes the holding of this court in the case of *Glasser* v. *United States*, 315 U.S. 74 and *Nudd* v. *Burrows*, 91 U.S. 426.

## APPENDIX

Petitioners append hereto a copy of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

WESLEY R. ASINOF,
Attorney for Petitioners,
419 Atlanta National Building,
Atlanta, Georgia

## JUDGMENT

Extract from the Minutes of June 10, 1960

HUEY CASH, FULLER CASH

and ARTHUR REAGAN, JR.,

No. 17991

versus

UNITED STATES OF AMERICA.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

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IN THE

# United States Court of Appeals

FOR THE FIFTH CIRCUIT

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No. 17991

---

HUEY CASH, FULLER CASH
and ARTHUR REAGAN, JR.,

*Appellants,*

versus

UNITED STATES OF AMERICA,

*Appellee.*

---

**Appeal from the United States District Court for the Northern District of Georgia.**

---

(June 10, 1960.)

---

Before RIVES, Chief Judge, and CAMERON and BROWN, Circuit Judges.

PER CURIAM: This appeal is from judgments of conviction for conspiracy to violate the internal revenue liquor laws and for the possession and sale of non-tax-paid distilled spirits. The only specification of error relied upon reads as follows:

> "1. The Court erred in overruling the objection made by counsel for the Appellants and in permitting the introduction of the testimony concerning conversations between the government witness John R. Evans and alleged co-conspirator Jimmy Sanders outside the presence of any of the defendants on trial, inasmuch as the government had failed to prove a prima facie case of conspiracy between Jimmy Sanders and the defendants on trial."

The conspiracy was, we think, established by ample evidence. Sanders, a Negro sharecropper with Huey Cash, lived on Cash's land about 250 yards from the Cash residence. Evans was working in an undercover capacity with a Federal Alcohol and Tobacco Tax Agent. On March 20, 1958, Cash agreed to supply Evans as much whiskey as Evans wanted at $35.00 a case. Evans was to return the following morning. Evans testified that upon his return:

> "I said I went down to his house and blowed the horn and called him a time or two, and he wouldn't get up; somebody finally hollered and asked me what did I want; I told him I had come after it; he said, 'See Jimmy,' and I went up to the colored man's house and got it."

Evans was familiar with Cash's voice. He did not positively recognize the shouted direction to "See Jimmy" as Cash's voice, but merely assumed that. Evans then went to Jimmy Sanders' house, where he paid Jimmy $35.00 per case for four cases of non-tax-paid whiskey. Five days later, after again contacting Cash, Evans made

a similar purchase, the delivery being made by Jimmy Sanders from a nearby church. A few days later, on April 1, 1958, Evans introduced the federal agent Powell to Cash, pretending that Powell was a bootlegging associate. Cash agreed on another sale of whiskey and told them that Jimmy would have it the next morning and to "go to Jimmy's house," "whenever you want whiskey, see Jimmy." Evans went alone, and testified, "Jimmy told me when I went after the whiskey the next morning he had done sold it before Huey saw him, all they had." Jimmy Sanders then dropped out of the picture. The conspiracy was well established independently of the statements of Jimmy Sanders to which Evans testified, and Jimmy's statements to Evans were admissible, *Montford v. United States*, 5 Cir., 1952, 250 F.2d 759, 760. Those statements related directly to the appellant Huey Cash alone, and it is therefore not necessary to trace the evidence as to the connection of the other two appellants with the conspiracy. The sufficiency of that evidence is not questioned. The judgment is

AFFIRMED.

A true copy

Test: EDWARD W. WADSWORTH

Clerk, U. S. Court of Appeals, Fifth Circuit, New Orleans, Louisiana.

Aug. 23, 1960.

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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**No. 17,991**

---

HUEY CASH, FULLER CASH
and ARTHUR REAGAN, JR.,
*Appellants,*

versus

UNITED STATES OF AMERICA,
*Appellee.*

---

**Appeal from the United States District Court for the Northern District of Georgia**

---

(AUGUST 12, 1960)

---

**ON PETITION FOR REHEARING**

Before RIVES, Chief Judge, and CAMERON and BROWN, Circuit Judges.

PER CURIAM:

The petition for rehearing in the above styled and numbered cause is hereby

DENIED.

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No. 395

# In the Supreme Court of the United States

OCTOBER TERM, 1960

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HUEY CASH, FULLER CASH AND ARTHUR REAGAN, JR.,
PETITIONERS

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

J. LEE RANKIN,
*Solicitor General,*

MALCOLM RICHARD WILKEY,
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*Attorneys,*
*Department of Justice,*
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# In the Supreme Court of the United States

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINION BELOW

The opinion of the Court of Appeals (Pet. 9-11) is reported at 279 F. 2d 159.

### JURISDICTION

The judgment of the Court of Appeals was entered on June 10, 1960 (Pet. 9). A petition for rehearing was denied on August 12, 1960 (Pet. 12). The

petition for a writ of certiorari was filed September 7, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether a declaration of a co-conspirator, made during and in furtherance of the conspiracy outside the presence of the other co-conspirators, is admissible as evidence against other members of the conspiracy.

## STATEMENT

The petitioners were convicted in the United States District Court for the Northern District of Georgia of conspiracy to violate and of substantive violations of the liquor laws. Petitioner Huey Cash was sentenced generally to imprisonment for 2 years and the others to imprisonment for one year (R. 2-6, 312-315). On appeal, the judgment was affirmed by the Court of Appeals (Pet. 11).

Petitioners do not contest the sufficiency of the evidence generally, but challenge only the admissibility of evidence of the acts and declarations of an alleged co-conspirator Jimmy Sanders who was indicted but not tried (Pet. 5). The pertinent evidence on this issue was as follows:

On March 20, 1958 John Evans, who was working with a Federal Alcohol and Tobacco Tax Agent (R. 29-30, 49), told petitioner Huey Cash that he wanted to start "hauling" a little whiskey, (R. 16-17). Cash said he could supply Evans with all he wanted at $35.00 a case (R. 17). The next morning, when

Evans, in front of Huey Cash's house, said he had come for the whiskey, a voice which Evans thought was Huey Cash's told him to see Jimmy (R. 18-20). Jimmy Sanders, a Negro sharecropper, lived in a house on Cash's property a few hundred yards away (R. 23, 248-249). Evans drove to Sanders' house and gave him $140.00 for several cases of non-tax-paid whiskey (R. 20, 51).

A day or two later, Evans went back to Cash's house and told him he wanted to buy more whiskey (R. 21). Cash said that whenever Evans wanted whiskey he was to see Jimmy (R. 28). On the following morning (R. 52), Evans purchased from Sanders for $140.00 several cases of whiskey kept in a nearby church (R. 25).

On April 1, 1958 (R. 53), Cash told Evans and Agent Powell that he would make arrangements with Jimmy to have whiskey for them the following morning (R. 53-54, 63). The next day, Sanders told Evans that Huey Cash had directed him to let Evans have the whiskey, but that Sanders had already sold all they had (R. 24). This last declaration was admitted over the objection of the defendants (R. 24).

## ARGUMENT

Petitioners contend that the Court of Appeals, in affirming the judgment of the District Court, has broadened the scope of hearsay testimony in conspiracy cases. (Pet. 6). It is, however, firmly established that statements by a conspirator made in furtherance of a going conspiracy are admissible as

exceptions to the hearsay rule. *Krulewitch* v. *United States*, 336 U.S. 440, 453; *United States* v. *United States Gypsum Company et al.*, 333 U.S. 364, 393; *Schine Chain Theatres, Inc.* v. *United States*, 334 U.S. 110, 117. There was ample evidence, independent of the challenged declaration, that Sanders was a member of the conspiracy which was admittedly proved as to petitioners. The facts that Cash sent Evans to Sanders after arrangements had been made for the sale of whiskey, and that Sanders then consummated the sale, fully justify the inference that Sanders was a party to the criminal enterprise.

## CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
*Solicitor General.*

MALCOLM RICHARD WILKEY,
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BEATRICE ROSENBERG,
THOMAS A. LATTA,
*Attorneys.*

SEPTEMBER 1960

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